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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 98

SUSIE V. WATWOOD,

Petitioner,

vs.

STONE'S MERCANTILE AGENCY, INC., A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Questions Involved

1. The question is, whether the decision is of general importance because it grants mercantile agencies power of economic destruction of the individual and is unconstitutional.

2. The question is, whether the decision is illegal because the Court has no authority to deprive petitioner of her constitutional rights under amendment 1, 4, 5 and 7, of privacy, of property, of employment, of trial by jury and redress of wrongs done her, for the benefit of private enterprise, as has been done here.

3. The question is, whether summary judgment should be granted for the defendant in a libel action where there is a bona fide dispute of facts on genuine issues.

4. The question is, whether the trial Court's suppression of evidence is reversible error.

5. The question is, whether the District Attorney's entrance into the libel action on motion to suppress evidence is reversible error.

Petition for Writ of Certiorari

Petitioner (appellant below) moves this honorable Court for a Writ of Certiorari from the judgment of the United States Court of Appeals for the District of Columbia Circuit entered January 17, 1952 (R. 90) and the denial of petition for rehearing entered March 4, 1952 (R. 114).

The decision is of general importance because it grants Mercantile Agencies power of economic destruction of the individual and is repugnant to the Constitution (*White* v. *Nichol,* 11 Law Ed. 591: *Morbary* v. *Madison,* 1 Crouch 137, 165, 166, 2 L. Ed. (60).

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 1254, Title 28, of the United States Code.

Statement of Case

Petitioner, plaintiff below, filed a complaint for libel (R. 21) and motions for the production of documents (R. 105) and to restrain the unlimited taking of depositions by the defendants (R. 105). The trial Court dismissed the complaint with leave to amend, denied plaintiff's motion for defendants to produce documents (R. 104) and ordered petitioner to submit to unlimited questioning by deposition. Petitioner moved *pro se* for a rehearing and to vacate the order (R. 105). This motion was withdrawn by her court appointed attorney (R. 27).

Petitioner filed an amended complaint (R. 28 R. 29). The Trial Court dismissed this on evidence not of record

(R. not printed) and neither the Court nor petitioner's attorney would disclose the evidence. Petitioner moved *pro se* to and was permitted to file a second amended complaint (R. 21) and issued a subpoena to the trial judge to discover what the suppressed evidence was on which the dismissal was based. The District Attorney (R. 38-39) entered the case by moving to quash the subpoena, (R. not printed) and the motion was granted (R. not printed).

Exhibit A (R. 6-8) attached to second amended complaint R. 2-6) is the basis of the libel and reads as follows:

"WATWOOD, Miss Susie V.,
Res. 1620 Fuller Street, N. W. Washington, D. C. (1941)
Dupont 0108
Born 1902—claims to be single.
Is an accountant by profession, reported to operate in her own behalf from her residence, although we could learn no definite details from those contacted; income estimated to be between $200.00 and $300.00 a month.

ASSETS

"Household furnishings.

CREDIT

"FURNITURE (A) 10/18/39: 'Account opened 12/16/30 for $187.50 terms $10.00 a month; owes nothing; last charge 4/16/38; repossessed 11/7/38 for $133.00; last payment 7/2/38.'
DEBT SUIT, 5/28/40; By T. F. Schneider Jr. vs. Susie V. for rent due, $103.00, $166.33.
DEBT SUIT: 7/17/40: By Thompson's Dairy Inc., for account $43.38 7/30/40 Judgment for plaintiff.
OLD RECORDS: Show three former landlords reported her satisfactory prior to 1940.

FAMILY

"Mother, Mrs. Mary Elizabeth Watson also resides same address and keeps home. Miss Watwood is reported to have one child attending school. According to informants the child's name is Gwen Cohen. (Italics ours)

ANNALS

"Susie resided at 1501 Mass. Ave., N. W. prior to February 1938, #103, Knowlton Apartments, 2227-20th Street, N. W. (9/1/39) 2127 California Street, N. W. and 1620 Fuller St., N. W.

From about October 1938 to 1942 was engaged in Public accounting for various firms.

"U. S. TREASURY DEPARTMENT, 15th and Pa. Ave., N. W. Personnel Clerk, 'From about 8/1/36 to 9/30/38; employed here as an assistant clerk; compensated at $1,620.00 per annum; permanent; satisfactory.' resigned 9/30/38.

Employed Reconstruction Finance Corp., 811 Vermont Ave., N. W. 12/27/43 to 3/25/46 as an accountant; well regarded.

Employed War Production Board satisfactory record.

Employed American Heating Co. (Mar. 1947 to May 1947); as a clerk, well regarded. Later Hecht Co., Silver Spring, Maryland 11/19/47 to 12/24/47) as a sales clerk. From 5/19/48 to 9/11/48 employed William Allen Shoe Store, as a clerk; well regarded.

Employed War Assets Administration, 3/25/46 to 2/28/47 as an accountant, compensated at about $4,-902.00 per annum; good record.

D. C. Civil Suit, 3/27/42: Susie V. Watwood vs. Jacob M. Cohen for damages for breach of promise to marry, $50,000.00.

D. C. Civil Order 11/4/42: Susie V. Watwood vs. Jacob M. Cohen, order for dismissal.

Burkenshaw (Neil) (E) Credit
Shoreham Building, # 730. (MAZHOL)"

As petitioner is married to Jacob Cohen, but never had a child at any time in her life, the statement that she is single and had a child is false and untrue (R. 3, para. 5).

One of Petitioner's nephews has been living with her and her mother, but is not named Gwen Cohen, which is a girl's name (R. 11, para. 6). He is not mentioned in the published report and his name (R. 44-45) should not be brought into this issue. All accounts shown unpaid in the report had been paid in 1942 (R. 45-46). Petitioner's mother's name is also Watwood (R. 42), not Watson. This report was mailed to one Neil Burkinshaw (R. 10) after it was prepared in the office of the Respondent (defendant below) by Louis F. Mazza, typed by Miss Dorothy Hollors, and handled and seen by Gordon H. Fletcher and William R. Stone (R. 54), file clerks and record clerks, all employees of Respondent. Then after receipt in Neil Burkinshaw's office, it was seen by members of his staff including his secretary and (R. 70) Dennis Collins. It was then transmitted to and seen by (R. 3) Alfred L. Bennett (R. 76-77) Maurice A. Guervitz and Mrs. Kathryn Berg (R. 80). None of the aforesaid persons were at any time acting as agents for or on behalf of the petitioner in the securing or reading of the report.

Respondents filed an answer to the amended complaint (R. 8-13) and issue was drawn.

Petitioner's attempt *pro se* to take discovery testimony was defeated by Respondent's plea of *Res Judicata* (R. 15-16) based on the Trial Court's order (R. 104) dismissing the original complaint and motion for production of document.

On October 20, 1950, the Court (Judge Holtzoff) granted a summary judgment in favor of Respondents, dismissing the complaint (R. 13) and an appeal was taken (R. 13-14). The Notice of Appeal was filed November 18, 1950.

The questions raised in the Appeal were:

> "1. Whether summary judgment should be granted for the defendant in a libel action, where there is a *bona fide* dispute as to the question of fact set forth in Question 2 and also a *bona fide* dispute of fact as to the publication of the alleged libel.
>
> "2. The question is, if one construction of the language used in an alleged libel renders the writing defamatory, and another construction of the language would render it innocent, whether it is for the jury to determine what is the proper construction to be put on the language used.
>
> "3. The question is whether publication of a libel by the defendant to a typist or stenographer of defendant and the subsequent mailing of the libel is sufficient publication."

In the following Opinion (R. 88-89), the United States Court of Appeals affirmed the Trial Court's judgment: (R. 90) on January 17, 1952.

> "EDGERTON, Circuit Judge: Appellant's second amended complaint for libel includes substantially the following statements. Appellee Mercantile Agency sent to a subscriber a credit report about appellant that had been read by several members of appellee's staff. It contained this language: 'WATWOOD, Miss Susie V. . . . claims to be single . . . Miss Watwood is reported to have one child attending school. According to information the child's name is Gwen Cohen . . . D. C. Civil Suit, 3/27/42; Susie V. Watwood v. Jacob M. Cohen, for damages for breach of promise to marry, $50,000. D. C. Civil Order, 11/4/42: Susie V. Watwood v. Jacob M. Cohen, order for dismissal.' According to the complaint, this language implies that appellant is the mother of a child born out of wedlock but the facts are that appellant is married to Jacob M. Cohen and is not a mother. She uses her maiden name in business.

"Appellee's answer to the complaint says appellee furnished the report in good faith to a subscriber, in response to his request, for use in his business, and that this subscriber forwarded it unread to appellant's attorney, at whose instance the subscriber had obtained it from appellee. The District Court awarded summary judgment to appellee on the ground that the pleadings and depositions showed there was no genuine issue as to any material fact and that appellee was entitled to judgment as a matter of law.

"A jury might well think appellee's report suggested that appellant was unmarried and a mother. The fact that she is neither does not prevent a suggestion that she is both from being defamatory. But the usual rule, which we think should prevail in the District of Columbia, is that a mercantile agency's credit report to an interested subscriber is qualifiedly privileged; unless it is made in bad faith or for an improper purpose, the fact that it contains erroneous unfavorable statements about the plaintiff does not make the agency liable.[1] The harm that such statements occasionally do to applicants for credit is believed to be small in relation to the benefits that subscribers derive from frank reports.[2] Since marital status and number of dependents bear on credit, the qualified privilege is broad enough to cover the statements in appellee's report.

"The agency need not show that the subscriber was actually interested in the plaintiff's credit. It is a general rule of the law of defamation that 'while a misguided notion as to the defendant's moral obligation or justification to make the statement will not exonerate him, he is privileged to publish it to any person who reasonably appears to have a duty, interest, or authority in connection with the matter.'[3] The principle is not confined to the law of defamation. 'In practically all cases of privilege in the law of torts the existence of a privilege depends upon the facts as they reasonably appear to the person whose liability is in question. The privilege of self-defense and the defense of prop-

erty, for example, are available if the defendant believes on reasonable grounds that defensive efforts are necessary. . . . Privilege is of little value if it depends upon the existence of facts that are unknown or unknowable to the person affected.'[4]

"The fact that the report was handled by more than one of appellee's employees in the ordinary course of business does not destroy the privilege. Globe Furniture Co. v. Wright, 49 App. D. C. 315.

Affirmed"

(Footnotes omitted.)

Petitioner petitioned for a rehearing (R. 91-111) on the basis that:

"1. The decision is in conflict with the Court's decision on the same date, January 17, 1952, in William F. Hughes and Josephine P. Hughes, Appellants v. The Washington Daily News Co., a corporation, Appellee. Case No. 10,964.

"2. The report being libelous *per se,* whether or not it was in bad faith or for an improper purpose is a finding of fact for the jury to decide, malice being provable.

"3. Appellant was not permitted to develop her evidence and present it to the Court below."

Respondents filed an opposition and the petition was denied on March 4, 1952 (R. 114).

Rule Involved

"Rule 56, Rules of Civil Procedure for the District Courts of the United States in regard to the pertinent part reads as follows:

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon.

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on

file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Statement of Points

1. The decision is of General importance because it grants mercantile agencies power of economic destruction of the individual.

2. The decision is illegal because the Court has no authority to deprive petitioner of her constitutional rights under amendment 1, 4, 5, and 7, of privacy, of property, of employment, of trial by jury and redress of wrongs done her, for the benefit of private enterprise, as has been done here.

3. Summary judgment should not be granted where there is a *bona fide* dispute of facts on genuine issues.

4. The Trial Court's suppression of evidence is reversible error.

5. The District Attorney's entrance into the libel action on motion to suppress evidence is reversible error.

Argument

1. THE DECISION IS OF GENERAL IMPORTANCE BECAUSE IT GRANTS MERCANTILE AGENCIES POWER OF ECONOMIC DESTRUCTION OF THE INDIVIDUAL.

This decision, if allowed to stand, establishes an international chain of blackmail cells with legal sanction. It is inconceivable that the appellate court would place the acts of a slander and libel peddling for profit secret investigating and reporting organization beyond the province of the law as has been done here. No person or organization is safe from their destructive hand if the decision stands. It is contrary to every precept of the Constitution. The

Supreme Court in *Marbary* v. *Madison*, 1 Cranch 137, 165, 166, 2 L. Ed. 60 (1801) held:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

Quoting from the 3rd Vol. of Blackstone's Commentaries, page 23, the Opinion continued:

> " 'It is a general and undisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is involved' and afterward, p. 109 of the same vol., he says, 'I am next to consider such injuries as are cognizable by courts of common law. . . . all possible injuries whatsoever, that did not fall within the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognisance of the common law courts of justice; for it is a settled and irrevokable principle in the laws of England that every right, when withheld, must have a remedy and every injury its proper redress.'
>
> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of vested rights."

No act of the legislature confers so extraordinary a privilege as granted to Respondents nor can it derive countenance from the doctrine at common law. Mercantile agencies are engaged in private enterprise for profit and should be responsible for defamatory publication and answerable in damages to the one defamed.

2. THE DECISION IS ILLEGAL BECAUSE THE COURT HAS NO AUTHORITY TO DEPRIVE PETITIONER OF HER CONSTITUTIONAL RIGHTS UNDER AMENDMENTS 1, 4, 5 AND 7, OF PRIVACY, OF PROPERTY, OF EMPLOYMENT, OF TRIAL BY JURY, AND REDRESS OF WRONGS DONE HER FOR THE BENEFIT OF PRIVATE ENTERPRISE.

The decision places no restraints upon the Respondents. It does not even say that they should make reasonable effort to publish accurate information about their victim. It says Respondents (R. 89):

> "need not show that the subscriber was actually interested in the plaintiff's credit . . . he is privileged to publish it to any person . . ."

and he,

> "is not confined to the law of defamation . . . The privilege of self-defense and the defense of property for example, are available if the defendant believes . . . defensive efforts are necessary."

The decision says the report suggests that petitioner is unmarried and a mother and that it is defamatory (R. 89) but that the damage done her is immaterial because Respondents' subscribers benefit from such reports.

The decision is in conflict with that Court's decision on the same date, January 17, 1952, in *William F. Hughes and Josephine P. Hughes*, Appellants v. *The Washington Daily News Co.*, a Corporation, Appellee, Case No. 10,964, in which it held that:

> "The privilege of fair report is no broader than the public interest that creates it. That interest is in public knowledge of official conduct . . . Appellee's newspaper mentioned no authority or source for its unqualified statements that appellants 'are charged with making and passing . . . bogus money' and that 'They made an air tour of the country trying to pass

> the bills'. It mentioned only 'Secret Service men' as authority for its statement that 'At least 15 were passed in Washington'. It did not mention the Secretary of the Treasury or intimate that he had made an announcement . . . accordingly it is not entitled to the benefit of what every privilege, if any might have attached to a report of such an announcement . . . 'It is well settled that the publication of any statement by a newspaper made upon its own authority, and not purporting to be a report' of official proceedings or statement 'is not privileged . . . The publication constitutes a charge by the person uttering it, and he is responsible there for.' Wood v. Constitution Publishing Co., 194 S. E. 760, 765 (Ga. App.) off'd 200 S. E. 131. Storey v. Wallace, 60 Ill. 51: Ilsley v. Sentinel Co., 133 Wis. 20, 28, 113, N. W. 425, 427; Lewis v. Hayes 165, Cal. 527, 530, 132, Pac. 1022, 1023; State v. Sheridan, 14 Idaho 222, 235, 93, Pac. 656, 660."

Appellee named no source, either public or private in their report. They merely said, (R. 6), "Watwood, Miss Susie V. . . . claims to be single . . . (R. 7) Miss Watwood is reported to have one child attending school. According to information the child's name is Gwen Cohen . . ." There is no statement of official birth records. Where did Appellee get the information that appellant was "single" and "had a child"? Mr. William Stone (R. 53), in answer to the question, "You would have an investigator go out and gather that information? says, "We don't have to do that much. It is done by telephone." Q. "Do your records (R. 55) show who in your organization got that information?" A. "Yes". Q. "Who was that?" A."Mr. Mazza." . . . Q. "So that, as I understand it Stones Mercantile Agency, as of this time, has no records as to where this information was secured that Miss Watwood had a child attending school named Gwen Cohen" A. "No."

Where is the official source! What is the source of the

publication! What was back of this publication? What was the motive for picking a non-existing name of a non-existing child and charging appellant of being the mother of such a child!

Mr. Stone says further (R. 55) "We had a record to indicate that she was married. We had a record to indicate that she was single." Yet they publish that appellant is "single" and "has a child." Where does Mr. Mazza get his information? (R. 82-83) "don't recollect"!

To place the stigma of being an unwed mother upon a woman is a serious thing. To place it in a commercial report and peddle it for profit without verification is a damnable act. How can the Court hold that such unverified libel is "qualifiedly privileged", and that "the harm done" to appellant "is believed small in relation to the benefits that the subscribers derive from frank reports." The Appellee was "carrying on business for profit out of motives of self interest as distinguished from an enterprise in the general interest of society and its communication is not privileged within the law of libel and slander" *Greenland* v. *Wilmshurst* (1913) 3 K. B. (Eng.) 507.

In *Pollasky* v. *Minchener,* 81 Mich. 280, 46, N. W. 5, 121 A. S. R. 516, 9 LRA, 102, the Court said:

> "It is all very well to advance the interest of the wholesale dealers as a class and afford them information which will reasonably protect them from loss. But there is no principle of justice or of law which requires this to be done at the expense of the individual."

The Courts' decision subordinates appellant's constitutional right of privacy, her right of property in her credit standing and occupation for the profit of appellee and their subscribers. What does she owe them? Appellant had

not asked for credit! She had not asked for the report! Appellee received a fee for libeling appellant and the court says that they are "qualifiedly privileged" to destroy her reputation, credit standing and employment and then avail themselves of the "privilege of self defense and the defense of property". Does appellant have no right of defense against such libel? Assuredly she has! Our forefathers wrote in the Constitution (4th Amendment):

> "The right of the people to be secure in their persons, houses, papers and effects . . . shall not be violated."

Petitioner's security of person and property, which includes the right of privacy and right of employment, have been violated by Respondents and by this decision. The Court derives its power only through the Constitution and the authority delegated to it by Congress. Amendment 1 provides that,

> "Congress shall make no law abridging the right of the people . . . to petition the government for a redress of grievance."

Clearly, since neither the Constitution nor Congress can grant such discretion to the Court, the Court has no authority to grant Respondents the power and privilege of economic destruction and character assassination of petitioner for the benefit of their subscribers or for private malice. There is no due process of law here. Amendment 5 of the Constitution provides that:

> "No person shall be . . . deprived of . . . property, without due process of law."

The decision violates amendment 7 of the Constitution which provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Petitioner contends that only one construction can be put on the words about the child, and that is that the words are libelous *per se.*

The report being libelous *per se,* whether or not it is made in bad faith or for an improper purpose is a finding of fact for the jury to decide, malice being provable.

Appellant alleged (R. 4-5) that in 1945, 1947, and again in 1948 she had personally requested appellee to correct their records as to her financial status and to delete the maliciously libelous content of their reports but that they continued to publish same. In *Austin* v. *Remington,* 46 Conn. 116, the Court quoting from Greenleaf, Vol. 3, Sec. 168:

> "Where the publication is only *prima facie* privileged . . . the defense of privilege may be rebutted by proof of actual malice."

In *White* v. *Nichol,* 11 Law Ed. 591, which was a suit for libel of one Robert White causing his removal from the office of Collector of Customs of the Port of Georgetown the Court held;

> "In every instance of slander, either verbal or written, malice is an essential ingredient; it must in either be expressly or substantially averred in the pleadings; and whenever thus substantially averred, and the language, either written or spoken, is proved as laid the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. The defense of the defendant in error, the defendant likewise in the

Circuit Court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the Circuit Court is defended in having excluded from the jury under the declarations in these cases, the writings charged in them as libelous. These writings were offered as evidence of express malice in the defendants. The exceptions relied on belonged to a class which, in the elementary treaties and in the decisions upon libel and slander have been denominated privileged . . . but the term "exception" as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actor or transactions placed above the cognizance of the law, absolved from the commands of justice, "It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good . . . Wright v. Woodgate (2 Crompton, Meeson & Roscoe, 573) . . . the privileged communication prejudical to the character of the plaintiff throws upon him the onus of proving malice in fact; . . . he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it"; . . . "We conclude then that malice may be proved . . . and that proof of express malice in any written publication, petition, or proceeding . . . will render that petition or proceeding libelous in its character . . . and we think that in every case of a proceeding like those just enumerated falsehood and the absence of probable cause will amount to proof of malice . . . The jury, and the jury alone, were to determine whether this malice did or did not mark the publication . . . In deed in the very many cases that are applicable to the question they almost without exception concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel

. . . itself. We refer for the position to Wright v. Woodgate (2 Crompton, Mees. & Ros. 573); Fairman v. Ives (5, Bonn and Ald. 642); Robinson v. May (2 Smith 3); Flint v. Pike (4 Barn & Cress, 484, pr Littledale, J.) Ib. 247 (Bromaze v. Prosser); Blake v. Pilford (1 Mood & Rob., 198); Parmeter v. Coupland (6 Mess & Welby, 115); Thompson v. Shackell (1 Mo. & Mol. 187) . . . We therefore adjudge that it (the Circuit Court's) decision be reversed; that these causes be remanded to the said Court, and that a *venid facias de nova* be awarded to try them in conformity with the principles herein laid down."

3. SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHERE THERE IS A BONA FIDE DISPUTE OF FACTS ON GENUINE ISSUES.

If there were "No hinge nor loop to hang a doubt on", in regard to a genuine issue on a material fact, a summary judgment would be in order. There is a *bona fide* dispute of facts as to the libel and as to publication of the libel in this case.

(A) Cautiously and carefully should the summary judgment rule be invoked; otherwise the constitutional right of trial by jury will be denied. The purpose of the rule, however, is intended to pierce the allegations of facts in a pleading in order to obtain relief where facts set forth in detail in depositions and admissions on file show no issues of fact to be tried.

Appellant contends that the report (R. 6-8) is a vicious libel. Nowhere in the report is there a word that the appellant is married. Going over the report, we see it headed, "Miss V. Susie Watwood." Then it states further down "claims to be single", and still further it says, "Miss Watwood is reported to have one child attending school. According to informants, the child's name is Gwen Cohen." Further down the report states, "D. C. Civil Suit, 3/27/42:

Susie V. Watwood v. Jacob M. Cohen for damages for breach of promise to marry, $50,000.00." "D. C. Civil Order 11/4/42: Susie V. Watwood vs. Jacob M. Cohen." By reading this report, the appellant appears to be, "a fixed figure for the time to scorn, to point his slow and moving finger at."

Perhaps this libel could be cured by "honeyed" words in the report but there are no "honeyed" words. The other words tell cruel "half truths" that give a flavor of veracity to the report. There is no fine shade of meaning in these statements, but a blunt malicious libel. The concrete fact is that appellant never had a child. The report is plainly libel *per se* as imputing unchastity to a woman—the appellant. Odgers on Libel and Slander, Sixth Edition, page 18-19; W. Blake Odgers and R. Ritson, Newell Slander and Libel, Fourth Edition, Chapter 5; 33 American Jurisprudence, Libel and Slander, Sec. 35, page 59; 53 Corpus Juris Secundum, Sec. 29 (a), page 69.

(B) Publication of libel is a question of fact.

The late chief justice of the New York Court of Appeals and later justice of the United States Supreme Court pungently and pointedly stated the concept of publication: "In the law of defamation, 'publication' is a term of art." *Ostrowe* v. *Lee,* 256 N. Y. 36, 175 N. E. 505. How is the art to be detected?

On a motion for summary judgment the Court cannot try issues of fact. It can only determine whether there are issues to be tried. *Miller* v. *Miller,* 74 App. D. C. 216, 122 F. 2d 209; *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. 2d 1016. The summary judgment procedure is not a substitute for the trial of disputed issues of fact. *Blood* v. *Fleming,* 161 F. 2d 292. It cannot be used to determine questions of fact without an adequate and proper hearing. *Lincoln Electric Co.* v. *Knox,* 56 F. Supp. 308. In the *Per Curiam* opinion of the *Lincoln* case, the Court con-

sisting of Groner, Circuit Judge, Bailey and Goldsborough, District Judges, stated at page 310:

> "The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts without an adequate and proper hearing."

There was not a proper and adequate hearing in the lower court (R. 14-19) as the plaintiff for most of the time was proceeding in proper person, while the appellee throughout the lower court proceedings was represented by two cagey, capable members of the District of Columbia bar, who twisted and distorted facts to confuse the issue.

A cursory glance at any of the depositions in the case will undoubtedly convince this Court that there was not a proper and adequate hearing on the merits of publication of libel by the lower court.

In 3 Federal Practice and Procedure 62, Barron and Holtzoff, it is stated:

> "Rule 56 is not merely directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues."

See *Dewey* v. *Clark*, 86 U. S. App. D. C. 137, and the cases cited therein for the applicability of the summary judgment rule.

Mr. Justice Lamar, speaking for the Court in *Baker* v. *Warner*, 231 U. S. 588, 594, writes:

> "This was error, since it is for the jury, and not for the court, to determine the meaning of ambiguous

> language in the published article . . . But there is a middle ground where, though the words are not libelous *per se,* yet in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning but they also determine whether those facts when coupled with the words make the publication libelous. Van Vechten v. Hopkins, 5 Johns 219. The meaning of the words was in dispute, and as that issue of fact was not submitted to the triers of fact, a new trial must be ordered."

There are several ambiguous constructions of these words about the child. It can be construed that appellant is the unmarried mother of her alleged nephew as her nephew lives with her and he attends school, which is a libel *per se.*

In *Gartman* v. *Hedgpeth,* 157 S. W. 2d 139, the Court states at page 141:

> "If it presents ambiguity, it is tested by what effect the language would have upon the mind of the ordinary reader and it would be for the jury to determine whether to such ordinary mind it suggested what plaintiff, in his innuendo averments, claims it suggested, and the trial court would be in error in sustaining the general demurrer. Belo & Co. v. Smith, 91 Tex. 221, 42 S. W. 850."

Again in *Ervin* v. *Record Pub. Co.,* 154 Cal. 79, 97 P. 21, 22 Judge Shaw, speaking for the Court states:

> "It is claimed by the defendant that persons acquainted with plaintiff and having knowledge of these facts could not understand the article published in any other than an innocent sense. This, however, would not remove its libelous character. It is sufficient to make a publication libelous if it is of such

> character that persons unacquainted with the plaintiff and hearing of her for the first time through said article, reasonably would and do understand therefrom that she is a person of low character and guilty of improper and immoral conduct; the charge, being so understood being false and malicious."

In *Dewey* v. *Clark*, 86 U. S. App. D. C. 137, 143, this Court speaking through Judge Fahey said, at page 143,

> "In making this determination doubts (of course, the doubts are not fanciful) are to be resolved against summary judgment."

Publication of a libel by the defendant to his typist or stenographer and the subsequent mailing of the libel is sufficient publication.

Publication of a libel is the communication of the defamatory matter to a third person. In the case at bar, appellee admits that Louis F. Mazza—his employee—prepared the report and it was typed by Dorothy J. Hollars, (R. 10-11), another of appellee's employees, and that it was sent to Neil Burkinshaw. Appellant in her complaint states that this report was seen by Mr. Mazza, Miss Hollars, Mr. Fletcher and William H. Stone of appellee's staff and the report was transmitted to the office of Neil Burkinshaw, where it was seen by Dennis Collins (R. 2-3) and then transmitted to the office of Alfred L. Bennett and Maurice A. Guervitz, where it was read and discussed (R. 3).

By the admission of the appellee, its employees saw the report.

These facts fit the leading English case on the point, *Pullman* v. *Walter Hill and Co.*, 1 Q. B. 524 (1891): A letter was dictated by the managing director of the defendants to a clerk, who took the words down in shorthand and then typed them. The letter was taken down by another em-

ployee of defendant in a copying press. It was mailed and read by two clerks when it reached its destination. The court held the letter had been published both to defendant's and plaintiff's clerks.

Mr. Justice Cardozo, speaking for the Court in *Ostrowe* v. *Lee,* 256 N. Y. 36, 175 N. E. 505, at page 506 said:

> "There is publication of a libel if a stenographer reads the notes that have been taken by another. Neither the evil nor the result is different when the notes that he reads have been taken by himself."

Publication by an employee of a railroad company to another employee of a railroad company is publication. *Bacon* v. *Michigan C. R. Co.,* 21 N. W. 324.

In *Gambrill* v. *Schooley,* 93 Md. 48, 48 A. 730, 731, Judge Pearce writes:

> . . . "A communication, therefore, to a stenographer, must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication.
>
> "The second branch of the argument is that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment in this country of such stenographers, and the necessity for such employment consequent upon the demands of business, a communication to such a stenographer should be made an exception to the general rule, and be held not an actionable publication. But we cannot adopt this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral

obligation to regard all his employer's communications as confidential alter the reason."

See also *Rickbeil* v. *Grafton Deaconess Hospital,* 23 N. W. 2d 247.

Publication of a libel by the defendant to the attorney of plaintiff is publication if the attorney requested the report for his own use and not at the request of the plaintiff.

Publication to someone other than defamed is publication. *Washington Annapolis Hotel Co.* v. *Riddle,* 83 App. D. C. 288.

In the case at bar, petitioner did not request the report nor did she instruct her attorney to secure such a (R. 48) report (R. 76). She did not cause publication! She had not asked for credit!, therefore, the occasion of privilege does not arrive as there is no privileged occasion of a mercantile agency to libel a stranger. The ruling in *Globe Furniture Co.* v. *Wright,* 49 App. D. C. 315, does not apply. There a letter was written from the defendant to plaintiff saying that the receipts had been tampered with and raised. This letter was written partly by defendant's general manager and partly by the bookkeeper, and it was shown to the bookkeeper and a collector. The court found for the defendant on the ground "that the letter was conditionally privileged, there was no malice."

In the case at bar, the appellee had no privileged occasion to write of appellant, and there was malice, therefore the doctrine of the *Globe Furniture* case does not apply.

Appellant contends that publication of a libel by the defendant to his typist or stenographer is sufficient publication to make the libel actionable, but that there was also publication to all recipients of the report.

4. THE TRIAL COURT'S SUPPRESSION OF EVIDENCE IS REVERSABLE ERROR.

An examination of the entire record which is before this Court, but not a part of the printed appendix will show that appellant was denied the right of discovery evidence and treated as a criminal instead of a plaintiff by the court below. Items picked out of context of the record and included in the appendix by the appellee are misleading to the Court and do not reflect what transpired in the court below. Appellees have twisted and distorted facts as shown in the record.

The order of Judge Matthews (R. 104) granting Appellee's motion to dismiss various motions was prejudicial to appellant in that it denied her the right of discovery of evidence which existed. Exception to this order was taken by Appellant, *pro se* (R. 105) by motion to rehear and motion to vacate order. This exception was withdrawn by appellant's Court appointed (R. 27) attorney over her objections (R. 105). Several pages of appellant's deposition were rewritten and inserted without her knowledge at the time after she had read and signed it. This was brought to the attention of the Court in appellant's motion for exclusion of Plaintiff's deposition from evidnece (R. 110-111) opposition to appellee's motion for summary judgment (R.106-110) and before Judge Holtzoff (R. 38-39), but was ignored by him.

Rule 26 and Rule 34, Federal Rules of Civil procedure give wide leaway in the discovery of evidence. The Court held in *Hutchinson* v. *Glover*, LR. 1 Q. B. Div. (Eng.) 138-CA.;

> "Everything that will throw light on a case is *prima facie* subject to inspection."

Other cases supporting right of discovery and examination of records are: *Empire Mfg. Co.* v. *Levy* (1907; 12

B. C. 387; *Brown* v. *United States*, 1928,28, 276, U. S. 134, 143, 48, S. Ct. 288; *Olson Trans. Co.* v. *Sococony Vacuum Oil Co. E. D. Wis.*, 1944, 8 Fed. Rule Service 3e 34, 41 Case 2; *Consolidated Rendering Co.* v. *Vermont*, 207:07 U. S. 541, 553, 554; *Wheeler* v. *U. S.*, 226, U. S. 478, 482, 483:83, 485.

5. THE DISTRICT ATTORNEY'S ENTRANANCE INTO THE LIBEL ACTION ON MOTION TO SUPPRESS EVIDEDENCE IS REVERSABLE ERROR.

There is no precedent or justificatiotion for the entrance of the District Attorney (R. 38) into th the proceeding in the trial court on motion to suppress evievidence by quashing subpoenas of witnesses as was done herhere. What was their reason and interest in the case? Th This action alone is reversible error.

Conclusion

Petitioner respectfully submits that at the decision should be set aside in the interest of the pulpublic welfare.

Respectfully submittetted,

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